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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-42

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

As there was no jurisdictionally valid state administrative order issued in this case, the questions presented for review are without basis and irrelevant.

Furthermore, the State Supreme Court's decision was based upon the record evidence and its construction of state statutes and regulations.

The XIV Amendment to the United States Constitution is not involved for the reason that the State Supreme Court found that respondent Walgreen Co. was not in violation of any requirement of a public authority when it refused to install the fire extinguishing system, and that since Walgreen's operation preceded the effective date of the pertinent regulation (K.A.R. 22-13-32) and no determination was made that the facilities constituted a distinct hazard to life or property (pet. 50a), there was no cause for a hearing as suggested by petitioners. Nor is there any evidence that the "fire marshal's order," created by petitioners, was ever issued.

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OPINIONS BELOW

Opinions below are as reproduced in petitioners' petition.

JURISDICTION

The decision of the Kansas Supreme Court entered on January 15, 1982, written by Chief Justice

Counsel for petitioners interpolates the "Fire Prevention Inspection Report" (pet. 9a, 10a) issued following the inspection of the respondent's store on October 12, 1978, by the Topeka Fire Department, Fire Prevention Bureau and the Kansas State Fire Marshal Department as the "fire marshal's order" (pet. 3 footnote 2), thus to qualify that report as the order contemplated by K.S.A. 31-139 (respondent's App. A1), which it should be noted provided, *inter alia*, that . . .

> "Whenever the state fire marshal or any person designated in K.S.A. 31-137 finds any violation of this act or the act of which this section is amendatory, or of any of the rules or regulations issued thereunder, or any lawful order issued pursuant thereto, he may file a criminal complaint with the attorney general or the proper district or county attorney or he may issue an order to the owner or his agent to cease and desist such violations. Any order so issued may be appealed by any person aggrieved thereby, as provided in K.S.A. 31-140, but unless otherwise stated in the order, the filing or pendency of such appeal shall not abate or operate as a stay of the effect of such order."

Had counsel been representing petitioners in the case before the trial court or on the appeals he would know that the point was repeatedly argued that such a criminal complaint or cease and desist order was never issued. We presume he had the full record before him in drafting the Petition For A Writ of Certiorari and that record which includes the decisions of the Trial Court and the Supreme Court of Kansas leaves no doubt that there was no "fire marshal's order." (pet. app.)

The Trial Court in its decision at paragraph 38 said *inter alia*, "However, there is no requirement of compliance (with the requirements of the State Fire Marshal) until such defendant received actual notice of such findings and requirements of the State Fire Marshal." (pet. 12a) and at paragraph 40(a)

> "Written notices of default or forfeiture sent by plaintiff to defendant prior to the report of the State Fire Marshal on October 13, 1978, failed to notify defendant of its obligation to install the dry fire extinguishing system and the automatic fuel/power shut-off device as required by Article No. 4 of the lease for the reason that the valid requirements of public authorities had not been established prior to such time."

Chief Justice Schroeder in the unanimous decision of the Supreme Court of Kansas, found that Walgreen was not in violation of any requirement of a public authority at the time it refused to install the fire extinguishing equipment and, consequently, had not breached articles 4 or 9 of its lease agreement and in so stating called attention to the regulations found at K.A.R. 22-13-32, which, addressing the question of retroactivity provides:

> "The regulations contained in the foregoing sections shall allow facilities in service prior to the effective date of such regulations, and not in strict conformity therewith, to continue in service so long as such facilities are not determined by the authority having jurisdiction to constitute a distinct hazard to life or property."

The Court found that no such determination was made.

Having so determined, the Supreme Court of Kan-

sas found that consideration of the sufficiency of notice of breach or of due diligence in correcting the breach becomes unnecessary. (pet. 50a)

We submit that had the Court found it necessary to determine the issue of notice by the public authority, it would have been governed by K.S.A. 31-139, 140, 141, and 142 (respondent's App. A1 through A3).

The record shows that Walgreen cooperated fully with the authorities in the installation of the fire extinguishing equipment and only because of the difficulty and delays in obtaining equipment which met all of the requirements of the authorities was it not able to meet the deadlines imposed by petitioners. (pet. 5a, 6a, 7a).

In finding that the tenant Walgreen was not in default under the terms of its lease with petitioners by reason of failure to install the fire extinguishing system in the time requested by petitioners, the Trial Court, in addition to finding that the notices of default sent prior to the report of the State Fire Marshal failed to comply with the provisions of Article No. 4 of the lease, (pet. 13a par. 40(a)) also found that:

> (b) Defendant Walgreen was under no obligation to install dry fire extinguishing system and the automatic fuel/power shut-off device merely upon request of plaintiff's insurance company.
>
> (c) Plaintiffs failed to give written notice to defendant as required by Article 19 of the lease of defendant's breach in failing to comply with the valid requirements of public authorities as required by Article No. 4 of such lease after the official report of the State Fire Marshal on October 13, 1978.

(d) A good faith dispute existed between plaintiffs and defendant with respect to the obligation of installing the dry fire extinguishing system and the automatic fuel/power shut-off device. Defendant sent a written demand to plaintiffs on November 17, 1978, requesting plaintiffs to install such equipment. Plaintiffs responded in writing on November 20, 1978, rejecting such demand of defendants. In a relatively short period of time thereafter, defendant installed within the first two weeks of December, 1978, such equipment at its own expense. In view of all the facts and circumstances disclosed by the evidence, the conduct of defendant in installing such equipment was not unreasonable and cannot constitute a material breach of the terms of the lease in question.

Petitioners state at page 5 of their petition that "although Walgreen did not seek administrative review of the fire marshal's order, it failed to comply with that order."

The evidence showed that the fire marshal never issued the "cease and desist order" because Walgreen cooperated with the office of the fire marshal and did comply with the requests made by the fire marshal.

Had the petitioners not been so anxious to cancel the lease by their premature filing of a lawsuit in the "Kansas State District Court," they could have asked that a cease and desist order be issued by the state fire marshal thereby invoking the administrative remedy which they avoided for reasons known better to them. That they failed to do so is not however as they claim, a denial of due process under the XIV Amendment.

Since all of the citations of petitioners are based

upon the false assumption that an administrative order contemplated by the statute had been issued, they are all irrelevant, immaterial and impertinent.

Furthermore the manner of citation of 228 Kan 789 and the footnote 9 thereto (pet. 11) are an affront to the integrity of the Supreme Court of Kansas. What is not stated in the footnote is that petitioners sought to disqualify not only Justice Prome but the other six justices sitting on the case as well.

The basic question of whether or not there was a default under the lease is important only to the petitioners who are seeking to obtain a higher lease rental, and to the respondent, which is attempting to abide by the terms of the lease.

CONCLUSION

For the foregoing reasons respondent respectfully submits that this Court should deny petitioners' Writ of Certiorari to the Supreme Court of the State of Kansas.

Respectfully submitted,

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STATUTES

Kansas Statutes Annotated

K.S.A. 31-133a

Fire extinguishers; inspection or service, certification by state fire marshal; rules and regulations.

(a) No person shall inspect or service portable fire extinguishers or automatic fire extinguishers for commercial cooking equipment without first being certified by the state fire marshal.

(b) The state fire marshal shall adopt rules and regulations establishing qualifications, testing procedures and certification of persons desiring to inspect or service portable fire extinguishers or automatic fire extinguishers for commercial cooking equipment.

(c) Inspection or service of any portable fire extinguisher by any person who is not certified by the state fire marshal as required by this section shall constitute a deceptive act or practice under the Kansas consumer protection act and shall be subject to the remedies and penalties provided by such act.

(d) The provisions of this section shall not apply to any person who is acting as an employee of the state or of a political subdivision of the state or as a firefighter, including a part-time or volunteer firefighter, of a political subdivision of this state.

(e) As used in this section, "automatic fire extinguisher for commercial cooking equipment" means any automatic fire extinguisher mounted directly above or in the ventilation canopy of commercial cooking equipment.

K.S.A. 31-139

Same; right of entry to determine compliance with law and regulations; complaint; order to cease and desist. The state fire marshal and those persons designated in K.S.A. 31-137 shall have the authority during all reasonable hours of operation to enter, in accordance with existing laws, in and upon all buildings and premises subject to this act for the purpose of examination, inspection and investigation to determine compliance with the rules and regulations promulgated under the authority of this act. Whenever the state fire marshal or any person designated in K.S.A. 31-137 finds any violation of this act or the act of which this section is amendatory, or of any of the rules or regulations issued thereunder, or any lawful order issued pursuant thereto, he may file a criminal complaint with the attorney general or the proper district or county attorney or he may issue an order to the owner or his agent to cease and desist such violations. Any order so issued may be appealed by any person aggrieved thereby, as provided in K.S.A 31-140, but unless otherwise stated in the order, the filing or pendency of such appeal shall not abate or operate as a stay of the effect of such order.

K.S.A. 31-140

Same; appeals from orders; notice and hearing; decisions; compliance. Any person aggrieved by any order or ruling issued pursuant to the provisions of this act may appeal such order or ruling to the state fire marshal within ten (10) days from the date of the service of such order by filing a notice of such appeal in the office of the state fire marshal. The

state fire marshal or his authorized representative shall hear such person within thirty (30) days after the receipt of such notice of appeal, and the state fire marshal shall give not less than ten (10) days' written notice of the hearing which shall be held in accordance with K.S.A. 31-141. Within fifteen (15) days after such hearing, the state fire marshal shall file his decision thereon and, unless by his authority the order is revoked or modified, the order shall be complied with within the time fixed in his decision.

K.S.A. 31-141

Same; powers of fire marshal in conduct of hearing; subpoena of witnesses and records; record of proceedings; statement; failure to comply with subpoena, effect; order by district court; service of process; costs, taxation. Whenever the state fire marshal or his authorized representative is required or authorized to conduct a hearing under the provisions of this act, he shall have the power to administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents which he deems relevant to the inquiry. The state fire marshal at such hearing may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the state fire marshal shall prepare a statement of the evidence and proceedings for use on review. In case of a refusal of any person to com-

ply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of Shawnee county or the county wherein such party resides, on application of the state fire marshal, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof. Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence. Notice of such hearings and any other process caused to be issued by the state fire marshal shall be served in substantial compliance with the requirements for service of process in district court. Whenever any person shall appeal an order or ruling issued pursuant to the provisions of this act, as provided in K.S.A. 31-140, and after a hearing as provided in this section the decision of the state fire marshal is adverse to such person, the costs of the hearing, including stenographic and witness fees, shall be taxed to such person.

K.S.A. 31-142

Fire safety and prevention; appeals to district court from orders of fire marshal, when; procedure; notice. Within thirty (30) days after the rendition of a decision in any such hearing by the state fire marshal, any person affected thereby may apply to the district court of the county in which the order is to become effective for a review of such order or decision. If the order of the state fire marshal is to become effective in more than one county, the application must be made to the district court of one of such counties.

The application for review shall be filed in the office of the clerk of the district court of the proper county, and it shall specifically state the grounds for review upon which the applicant relies and shall designate the order or decision sought to be reviewed. Notice of such appeal shall be given in the manner provided in K.S.A. 60-2101, and any amendments thereto.